MAJID JAKOL

v.

THE PROBATE OFFICER & ORS

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[SUIT NO: 22-20 OF 1999]
11 JULY 2001

CIVIL PROCEDURE: *Parties - Person under disability initiating suit by his "guardian ad litem" instead of "next friend"- Wrong terminology - Whether goes to form rather than substance - Whether an irregularity - Whether curable - Discretion of court - Order 2 r. 1(2) of the Rules of the High Court 1980*

CIVIL PROCEDURE: *Statement of claim - Striking out - Whether plaintiff's claim discloses reasonable cause of action - Whether obviously unsustainable - Whether claim vexatious and an abuse of the process of the court - Order 18 r. 19 of the RHC 1980*

In 1978, the plaintiff claimed he was granted letters of administration (the "first grant of administration") by one Jalaludin, his deceased brother, which gave the plaintiff authority to deal with a parcel of land. Seventeen years later, the 3rd defendant, claiming to be the only survivor and grandson of Jalaludin, was granted letters of administration (the "second grant of administration") by the 1st defendant. A memorandum of transfer was then duly executed by the 3rd defendant in favour of the 4th defendant. The 4th defendant as the registered proprietor of the land later granted the 5th defendant irrevocable power of attorney over the land. Upon discovering that the 3rd defendant had obtained the second grant of administration and the course of events subsequent thereto, the plaintiff commenced proceedings against the defendants; amongst others; seeking declaration, orders and injunctions to revoke the second grant, and that all subsequent dealings and transfers of the land to be invalid.

At the time the plaintiff filed the suit, he was 82 years of age and was suffering from senile dementia. As such, pursuant to O. 76 r. 3(7) Rules of the High Court 1980 ("RHC"), one Putit signed a consent to be the "guardian *at litem*" (instead of "next friend" as required by O. 76 r. 2 of the RHC) of the plaintiff; authorising the plaintiff's present solicitor to act on his behalf.

In this hearing, the 4th and 5th defendants applied under O. 18 r. 19(1)(a) or (b), (c) and (d); and O. 92 r. 4 RHC to strike out the plaintiff's claim against them on two main grounds, *ie*; (i) that the action has been improperly commenced, as the plaintiff sues by his "guardian *ad litem*" whereas he should

do so by his "next friend"; and (ii) that the statement of claim discloses no reasonable cause of action, was frivolous, vexatious and an abuse of the process of court.

Held:

[1] The error made by the plaintiff in describing Putit as "guardian *ad litem*" instead of "next friend" is not fatal and is to be treated as an irregularity under O. 2 r. 1 RHC. In this instance, the plaintiff had not acted in total disregard of the rules. The wrong choice of terminology is one that goes to form rather than substance, as in each instance in which it has been used, if the term "next friend" had been used instead of "guardian *ad litem*", the defect complained of is cured. In a situation like this, the court looks beyond the terminology of a document to the actual substance of it.

[2] There was an arguable point in that an irregularity can be cured, if the plaintiff applies to do so. However, O. 2 r. 1(2) RHC confers on the court a wide discretion when dealing with an irregularity. To exercise that discretion to cure a breach of rules only in instances where an application is made to do so would place unnecessary fetter on the court's discretion.

[3] Since the wrong choice of terminology was one that went to form and not to substance, there is no indication that the 4th and 5th defendants have been prejudiced by such error. The justice of the case is such, that an amendment should be allowed to cure the irregularity. A striking out cannot, therefore, be obtained on this ground.

[4] As far as striking out a plaintiff's claim is concerned, the court will only exercise its summary jurisdiction under O. 18 r. 19 RHC where it is demonstrated that the claim is unsustainable. Since the plaintiff did not plead or allege fraud or any other wrongdoing against the 4th and 5th defendants, it is construed that the plaintiff has not pleaded any material facts upon which it may be said to be a reasonable cause of action against the defendants. The plaintiff's action against them is, therefore, wholly unsustainable and should be struck out.

[5] To drag the 4th and 5th defendants before the court and not plead any reasonable cause of action against them is not only frivolous and vexatious, but also an abuse of the process of court. For the aforesaid reasons, the claim is struck out.

[4th and 5th defendants' application allowed with costs; plaintiff's claim against 4th and 5th defendants struck out.]

Case(s) referred to:
Bruce v. Odhams Press Ltd [1936] 1 KB 697 ***(refd)***
Golden Century Development Sdn Bhd & Anor v. Ganhoe & Anor [1983] 1 MLJ 86 ***(foll)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***
Letang v. Cooper [1965] 1 QB 232 ***(refd)***
Malayan Banking Bhd v. PK Rajamani [1994] 2 CLJ 25 ***(refd)***

Legislation referred to:
Land Code (Cap 81) Sarawak, ss. 132(1), 133, 134
Rules of the High Court 1980, O. 2 rr. 1(2), 2, O. 18 rr. 7(1), 19(1)(a), (b), (c), (d), O. 76 rr. 1, 2(1), 3(7), (a), (c)(i), (ii), (iii), O. 92 r. 4

For the plaintiff - David Kuok; M/s Wong, Orlando Chua & Co
For the 1st & 2nd defendants - Sabwati Shukrin Balia (Zainuddin Husaini); AG's Chambers
For the 4th & 5th defendants - Lim Choun Hong; M/s Chan, Jugah, Hoo & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Clement Skinner J:

This is the hearing of an application by the 4th and 5th defendants under O. 18 r. 19(1)(a) or (b), (c) and (d) and O. 92 r. 4 Rules of the High Court 1980 ("the RHC") to strike out the plaintiff's claim against them. The facts leading to their application are these.

One Jalaludin Jakol passed away on 14 October 1976. He died without leaving issue and was not survived by his parents. He was, however, survived by two brothers, Majid Jakol the plaintiff herein, and Abu Bakar Jakol who does not feature in these proceedings. At the date of his death, Jalaludin owned several parcels of lands. Of these, only one concerns us here. It measures 8.26 acres and is known as Block 29 Lot 1, Bakong (hereafter 'the said land'). On 7 March 1978, the 1st defendant as the probate officer, district office, Dalat, granted letters of administration of the estate of Jalaludin (hereafter 'the first grant of administration') to the plaintiff. It is alleged by the plaintiff that the first grant of administration gave him authority to deal with the said land.

Some 17 years later, on 24 April 1995, one Apan Drahman who is the 3rd defendant herein claiming to be the only survivor and grandson of Jalaludin was granted letters of administration of the estate of Jalaludin (hereafter 'the second grant of administration') by the 1st defendant. The second grant of administration gave the 3rd defendant authority to deal with the said land also.

On 26 July 1995 the 3rd defendant applied for transmission of the said land into his name and on 29 March 1996, the 4th defendant purchased the said land from the 3rd defendant for a sum of RM30,000. A memorandum of transfer was duly executed by the 3rd defendant in favour of the 4th defendant and the same has been duly registered at the Sibu Land Registry as Instrument No. L.12130/1996.

On 10 June 1996, the 4th defendant as the registered proprietor of the said land and in consideration of the payment of RM150,000 to him by the 5th defendant, granted to the latter an irrevocable power of attorney over the said land which the 5th defendant has registered at the Sibu Land Registry *vide* Instrument No. L.12832/96. On 24 June 1998 the 4th defendant granted a supplementary power of attorney in favour of the 5th defendant over the said land. The 5th defendant is presently, in joint venture with a third party, developing the said land for aquaculture purposes.

Sometime between August and October 1998 the plaintiff discovered that the 3rd defendant had obtained the second grant of administration and had transferred the said land to the 4th defendant. He then requested the 1st defendant as the probate officer, district office, Dalat, to revoke the second grant of administration and to declare all subsequent dealings and transfers of the said land as null and void but the 1st defendant has not done so.

The plaintiff, accordingly, commenced these proceedings on 15 March 1999. At that date he was some 82 years old. There are two medical reports which show that the plaintiff presently suffers from senile dementia and it seems that he was not in total control of his mental faculties in 1999 when this action was commenced. The rules of court require that any person under disability may not bring or make a claim in any proceedings except by his next friend (O. 76 r. 2). Order 76 r. 1 defines a "person under disability" as a person who is an infant or a patient, and a "patient" is defined to mean a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952. I do not think it can be seriously disputed that the plaintiff was a person under disability when this action was commenced.

This is how the plaintiff is described in the intitulement:

> Majid bin Jakol (BIC K. 401273)
> (patient suing by his guardian ad litem
> Putit @ Ujang bin Abu Bakar)
> (WN.KP. 500211-13-5097)
> Kampung Brunei,
> 96300 Dalat.

So, instead of suing by his next friend, the plaintiff is described as suing by his guardian *ad litem*.

Before the action was commenced, the intended next friend Putit Abu Bakar (hereafter 'Putit') signed a consent which is intituled "consent of guardian *ad litem* of person under disability (O. 76 r. 3(7))" giving his consent to be the 'guardian *ad litem*' (instead of as 'next friend') of the plaintiff and authorising or appointing the plaintiff's present solicitor to act on his behalf. Because this is not a case where Putit had already been appointed as next friend of the plaintiff under the provisions of the Mental Disorders Ordinance 1952, the rules of court (O. 76 r. 3(7)(c)) required the solicitor who had been appointed to act to file a certificate supplying the information required to be stated in such certificate. Although the solicitor did not file such a certificate when the action was commenced, he has done so subsequently. In this certificate, Putit is again described as the 'guardian *ad litem*' of the plaintiff, instead of as 'next friend'.

In so far as the facts pleaded in the plaintiff's statement of claim is concerned, the plaintiff has accused the 3rd defendant of fraudulently misrepresenting that he is the grandson and only person entitled to the estate of Jalaludin. The plaintiff also accuses the 1st defendant, as probate officer, of negligence in having issued the second grant of administration to the 3rd defendant. The plaintiff also alleges that the second grant of administration obtained by the 3rd defendant is invalid by reason whereof all subsequent dealings and transfers of the said land were invalid and became null and void. There is, however, no allegation of any wrongdoing against the 4th and 5th defendants but the plaintiff has sought the following relief against the defendants jointly and severally:

(1) A declaration that the second grant of administration is null and void and to be revoked and all subsequent dealings and transfers of the said land are invalid.

(2) An order that the defendants do execute all such documents and do all such acts as may be necessary to re-transfer the said land to the plaintiff.

(3) A declaration that by the negligent act of the 1st defendant, the 2nd defendant is vicariously liable to pay damage to the plaintiff for the loss caused to him.

(4) An injunction to restrain the 3rd, 4th and 5th defendants whether by themselves, their servants or agents or howsoever otherwise from transferring or in any way dealing with the said land until the disposal of the suit.

(5) An injunction to restrain the 3rd, 4th and 5th defendants whether by themselves, their servants or agents or howsoever otherwise from entering or using the said land until disposal of the suit.

(6) General damages to be assessed.

(7) Any other reliefs as the court deems fit.

(8) Costs.

On being served with the writ and statement of claim, the 4th and 5th defendants immediately entered an appearance and thereafter brought this application to strike out the plaintiff's claim. They have not yet filed in a defence to the plaintiff's claim.

The 4th and 5th defendants seek to set aside the plaintiff's claim on two main grounds:

(a) the action has been improperly commenced because the plaintiff sues by his 'guardian *ad litem*' whereas he should do so by his next friend; and

(b) the statement of claim discloses no reasonable cause of action against them or it is frivolous and vexatious or it may prejudice, embarrass or delay the fair trial of this action and is otherwise an abuse of the process of court.

As far as the 4th and 5th defendants' first ground is concerned, there can be no doubt that by the clear provisions of O. 76 r. 2(1) RHC a person under usability, such as the plaintiff, cannot bring or make a claim in any proceedings except by his 'next friend', and where such a person wishes to defend, make a counterclaim or intervene in any proceedings, he must do so by his 'guardian *ad litem*'. It is quite clear to me that the plaintiff has, unfortunately, used the wrong terminology in describing Putit when commencing these proceedings. I say unfortunately because the plaintiff's solicitor seems to have been conscious of the fact that the plaintiff was a person under disability and, therefore, needed to file in the requisite documents mentioned in O. 76 r. 3(7) RHC. Those documents in so far as they are relevant to the facts of this case are:

(i) the written consent of the person who will act as next friend (O. 76 r. 3(7)(a)) which consent is to be in Form 189, and

(ii) the certificate made by the solicitor for the person under disability, certifying to the matters mentioned in O. 76 r. 3(7)(c)(i), (ii) and (iii) such certificate to be in Form 190.

To comply with O. 76 r. 3(7), the plaintiff did file in the required written consent in Form 189 and the certificate in Form 190 (although late) but has, in both documents, used the wrong terminology to describe Putit as 'guardian *ad litem*' instead of as 'next friend'. This error has given rise to the 4th and 5th defendants' complaint that this suit was improperly commenced as Putit had no *locus standi* to do so, as on the documents filed, he does so as guardian *ad litem* and not as next friend.

It was also said by the 4th and 5th defendants that the plaintiff had failed to file in Form 190 i.e. the certificate given by the solicitor acting for the person under disability, and for that reason too the suit had been improperly commenced and must be struck out. I do not think that complaint remains valid because the plaintiff's solicitor did file in the certificate in Form 190. Although it was filed in late, by the time this application was heard there had been compliance with the rule.

Counsel for the plaintiff takes the view that even if the words 'next friend' or 'guardian *ad litem*' are used inappropriately in the title to the action and the documents filed in court, it should be regarded as an irregularity and not result in the action being struck out. The error can be rectified under O. 2 r. 1 RHC.

Counsel also contended that the 3rd and 4th defendants have waived the irregularity by entering an unconditional appearance in this action after becoming aware of the irregularity.

In my judgment, the error made by the plaintiff in describing Putit as 'guardian *ad litem*' instead of 'next friend' is not fatal and is to be treated as an irregularity under O. 2 r. 1. This is not a case where the plaintiff has acted in total disregard of the rules. In fact he has taken steps to comply with O. 76 but has not 'got it right', so to speak, because he has chosen to use the wrong terminology. In my view, that wrong choice of terminology is one that goes to form rather than substance because in each instance in which it has been used, if the term 'next friend' had been used instead of 'guardian *ad litem*' the defect complained of is cured without the other particulars set out in either the statement of claim or the consent in Form 189 or the certificate in Form 190 needing to be amended or changed – they contain the information required of them and serve the purpose they were intended for. In a situation such as this the court should look beyond the terminology of a document to the actual substance of it. (See, *Malayan Banking Bhd v. PK Rajamani* [1994] 2 CLJ 25.

The question is, should the irregularity be cured? According to counsel for the 4th and 5th defendants, it can only be cured if the plaintiff applies to do so, otherwise there is no material before the court on which discretion can be exercised in favour of the plaintiff. I regret I am unable to agree with this submission. O. 2 r. 1(2) confers on the court a wide discretion when dealing with an irregularity and I do not think that discretion to cure or forgive an omission or a breach of the rules is to be exercised only in those instances where an application is made to do so. That would place an unnecessary fetter on the court's discretion. The proper approach to be taken by a court is set out in the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305. It was there said by his Lordship Gopal Sri Ram JCA at p. 319:

> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance. That power, as in all matters calling for curial discretion, is to be exercised judicially having regard to the substantial merits of a case and having particular regard to the interests of justice. ... Ultimately, it is the objective perception of a court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceeding.
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> In my judgment, the correct position is that stated by Cumming-Bruce LJ in *Metroinvest Ansalt & Ors v. Commercial Union Assurance Co Ltd* [1985] 2 All ER 318 at p. 323:
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> > As I construe O. 2 r. 1, from the moment a step in proceedings is tainted by irregularity through failure to comply with the rules, the irregular step or document remains irregular *inter partes* until the matter has been brought before the court and the court has decided in which way to exercise the jurisdiction conferred by O. 2 r. 1(2). **Order 2 r. 2 does not restrict the power of the court in the sense of restricting its jurisdiction, and does not have the effect of suspending the irregularity until the application under O. 2 r. 2 is made. The purpose and effect of O. 2 r. 2 is to prescribe the procedure if and when an opposite party decides to apply so that the court on recognising the irregularity, may exercise its powers under r. 1(2) by taking the action of killing or curing the irregular proceeding**.

I have highlighted the last two sentences of the judgment of Cumming-Bruce LJ to draw attention to the fact that the learned judge was there saying that from the moment a step in the proceedings is tainted with irregularity through failure to comply with the rules, it remains irregular until the matter is brought before the court and the court decides in which way it will exercise its jurisdiction under O. 2 r. 1(2). But the irregularity complained of cannot be simply ignored by the party affected by it because, as explained, O. 2 r. 2

does not have the effect of suspending the irregularity until an application under O. 2 r. 2 is made to set it aside. And as explained by the learned judge, the matter is brought before the court by the procedure prescribed in O. 2 r. 2 i.e. by an application to set aside. That application is made by the "opposite party" i.e. the party complaining about the irregularity, and when the matter comes before the court in that way, the court on recognising the irregularity, may exercise its discretion under O. 2 r. 1(2) by taking the action of killing or curing the irregular proceeding. I do not, therefore, think it is right to say that the court can only exercise its discretion under O. 2 r. 1(2) when the party who causes the irregularity applies to the court to cure it. That jurisdiction may be exercised on an application to set aside the proceeding.

Reverting to the facts of this case, I had indicated that the wrong choice of terminology was one that went to form only and not to substance. I cannot see in what manner the 4th and 5th defendants have been prejudiced by such error. The justice of the case is such that an amendment should be allowed to cure the irregularity. A striking out cannot, therefore, be obtained on this ground. In view of the conclusion I have just arrived at, I do not find it necessary to deal with the submission of the plaintiff that the 4th and 5th defendants had, by entering an unconditional appearance, waived the irregularity complained of.

I now turn to consider the 4th and 5th defendants' second ground for striking out. It is their case that the plaintiff's statement of claim discloses no reasonable cause of action against them as the 4th defendant is presently the registered proprietor of the said land and his title thereto is indefeasible and can only be defeated in the manner provided in the Sarawak Land Code. According to counsel for the 4th and 5th defendants, the Sarawak Land Code does provide that the title of a registered proprietor can be defeated by fraud but no allegation whatsoever of fraud is made against the 4th and 5th defendants. The 4th and 5th defendants also say that in so far as the statement of claim contains an allegation of fraud against the 3rd defendant, it contains no allegation that they are privy to the fraud allegedly committed by the 3rd defendant, even assuming, without admitting, that the plaintiff's allegations against him are correct.

The plaintiff's answer to the 4th and 5th defendants' complaint is that the court should only look at the pleadings to determine whether or not a reasonable cause of action has been pleaded against them. According to counsel for the plaintiff, since the 4th and 5th defendants have not filed any defence, they cannot claim to be *bona fide* purchasers of the said land and the affidavits that have been filed on their behalf cannot also be looked at to establish that

fact. According to counsel, only the statement of claim must be looked at and when that is done it will be seen that the plaintiff has averred that the 3rd defendant had fraudulently misrepresented that he is the grandson of Jalaludin. This fraudulent misrepresentation had resulted in any subsequent dealings and transfer of the said land becoming invalid, null and void, and therefore, the plaintiff is seeking a declaration that the second grant of administration to the 3rd defendant is void and that the subsequent dealings and transfers of the said land are invalid.

It will be convenient at this stage to refer to the rules of pleading and the law on when the court will exercise its jurisdiction to strike out a statement of claim as disclosing no reasonable cause of action. Order 18 r. 7(1) RHC provides that:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which these facts are to be proved, and the statement must be as brief as the nature of the case admits.

The rule requires, therefore, that the material facts on which the party pleading relies on for his claim against a defendant to be set out. The word "material" has been explained in the case of *Bruce v. Odhams Press Ltd* [1936] 1 KB 697 at p. 712 by Scott LJ. He said:

> ... The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" fact is omitted, the statement of claim is bad; ...

And in the case of *Letang v. Cooper* [1965] 1 QB 232, Lord Justice Diplock defined the words "cause of action" as:

> a factual situation the existence of which entitled one person to obtain from the court a remedy against another person.

In so far as striking out a plaintiff's claim is concerned, the court will only exercise its summary jurisdiction under O. 18 r. 19 RHC where it is demonstrated that the claim is obviously unsustainable.

In *Golden Century Development Sdn Bhd & Anor v. Ganhoe & Anor* [1983] 1 MLJ 86, this is what Wan Suleiman FJ said about the summary jurisdiction of the court, at. 87:

> We think it will suffice for us to refer to the well known authority *AG of Duchy of Lancaster v. L. & N.W. Railway Co* [1892] 3 Ch. 274 in which it was held that the summary procedure under the English rule which is identical to ours, can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable".

Taking the approach that counsel for the plaintiff urges me to and confining myself to the statement of claim alone (since a defence has yet to be filed), the following is evident to me:

(a) The allegations of fraud are directed at the 3rd defendant only.

(b) There had been a transmission of the said land into the name of the 3rd defendant, whereafter he had transferred the said land to the 4th defendant for valuable consideration of RM30,000.

(c) The 4th defendant is the present registered proprietor of the said land.

Given the fact that from the plaintiff's own pleaded case, the 4th defendant is acknowledged as the present registered proprietor of the said land and had become registered as such proprietor by way of a transfer of the said land from the 3rd defendant for valuable consideration of RM30,000, the plaintiff cannot ignore the fact that the relevant provisions of the Sarawak Land Code (Cap. 81) (hereafter 'the Code') will determine whether or not the 4th defendant's position as registered proprietor of the said land is indefeasible or not.

The first of these provisions is s. 132(1) of the Code which confers indefeasibility of title on a registered proprietor of land except in the case of fraud. Section 132 which is headed "indefeasibility of title" reads:

> (1) Subject to this Code, the registered proprietor of any estate or interest in land to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest except:
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> (a) the estate or interest of a proprietor included in the Register in priority to the title under or through which the first mentioned registered proprietor claims, being an estate or interest to which this section applies;
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> (b) as regards any portion of land included in the issue document of title by virtue of a wrong description:
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> Provided that this exception shall not apply if the registered proprietor is a purchaser in good faith and for value of the portion of land affected, or derives title through such a purchaser;
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> (c) the implied conditions, obligations and restrictions referred to in section 32;
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> (d) the interest of a tenant in possession of land for a term not exceeding one year;

(e) any charge affecting the land under any written law; and

(f) any easement lawfully created and subsisting on the 1st day of January 1958, or at such later date when the estate or interest affected by such easement becomes included in the Register.

The next relevant provision under the Code is s. 133 which provides that except in the case of fraud, a person dealing with or obtaining a transfer from a registered proprietor of land shall not be concerned to ascertain how such proprietor or previous proprietor became registered as proprietor. Section 133 which is headed "doctrine of notice not to apply" reads:

(1) No person, whether or not he has become registered as the proprietor of any interest, who contracts or deals with, or takes a transfer from, a registered proprietor or with or from a person who is entitled to be registered as proprietor shall, except in the case of fraud, be concerned to ascertain the circumstances under which such proprietor, or any previous proprietor, was registered, or to see to the application of the purchase money, or be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding.

(2) The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud for the purpose of this section.

The next relevant provision of the Code is s. 134 which is headed "effect of fraud" and reads:

(1) Any issue document of title or entry or alteration in the Register procured or made by fraud shall be void as against any person defrauded, or who may be defrauded, thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.

(2) Nothing in this Code shall be so construed as to place in doubt the title of any person who is a purchaser in good faith and for value of any interest, and who is registered as the proprietor of such interest, on the ground that the registered proprietor through or under whom he claims was registered as proprietor through fraud or error, whether such fraud or error consisted in a misdescription of the land or otherwise.

A reading of the aforementioned sections of the Code show that if the plaintiff is to impeach the title of the 4th defendant to the said land, he must allege fraud against the 4th and 5th defendants or show that they were party or privy to the alleged fraud of the 3rd defendant. However, a perusal of the statement of claim shows that there is absolutely no allegation of wrongdoing against

the 4th or 5th defendants. In particular, no allegation of fraud or fraudulent conduct has been made against them to show that they had acted in collusion with the 3rd defendant to obtain the second grant of administration or to obtain a transmission of the said land into the name of the 3rd defendant or thereafter to obtain the registration of the 4th defendant as the registered proprietor of the said land.

The plaintiff not having pleaded or alleged fraud or indeed any other wrongdoing against the 4th and 5th defendants in the statement of claim, I am constrained to hold that the plaintiff has not pleaded any material facts upon which it may be said a reasonable cause of action had been disclosed against the 4th and 5th defendants. The plaintiff's action against them is, therefore, wholly unsustainable and should be struck out on this ground alone. However, the 4th and 5th defendants say the statement of claim is also frivolous and vexatious and is otherwise an abuse of the process of court.

I think the 4th and 5th defendants are well founded in their complaint and I say so for the following reasons: When the plaintiff discovered the matters complained about in this suit, his solicitors wrote a letter to the 1st defendant on 10 October 1998 asking him to revoke the second grant of administration. That letter was copied to the 4th and 5th defendants. On 26 October 1998 their solicitors wrote to the plaintiff's solicitors informing them that prior to the 4th defendant purchasing the said land from the 3rd defendant, they (i.e. the 4th defendant's solicitors) had done a proper search at the land registry and that the 4th defendant had no notice whatsoever that the first grant of administration had been made to the plaintiff. In their letter, the 4th defendant's solicitors asserted the 4th defendant's position as the registered proprietor of the said land with an indefeasible title to the same. The plaintiff was, therefore, well aware of the position taken by the 4th defendant. The solicitors acting for the 5th defendant also wrote a letter to the plaintiff's solicitors on 21 October 1998 in reply to the plaintiff's letter of 10 October 1998. In that letter the 5th defendant's solicitors informed the plaintiff's solicitors that the 5th defendant had no knowledge of the plaintiff's position as administrator of the estate of Jalaludin and that the 5th defendant was a *bona fide* purchaser of the interest created in their favour by the power of attorney. So, although the plaintiff was fully aware that the 4th defendant was asserting that he was the registered proprietor holding indefeasible title and that the 5th defendant was asserting his position as *bona fide* purchaser, the plaintiff has commenced this action against them but has not pleaded any case against them in fraud

so as to impeach their interest in the said land. To drag the 4th and 5th defendants before the court but not plead any reasonable cause of action against them is, to me, not only vexatious but an abuse of the process of court. For that reason too this claim should be struck out.

In the result, I allow the 4th and 5th defendants' application with costs. The statement of claim against them is struck out.